



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

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March 6, 2000

Mr. Will Stelle, Regional Administrator
National Marine Fisheries Service
Northwest Region
7600 Sand Point Way NE, Bldg 1
Seattle, Washington 98115

Dear Mr. Stelle:

Thank you for the opportunity to comment on your proposed rules governing "take" of Pacific Salmon under Section 4(d) of the Endangered Species Act (ESA). We recognize the daunting task you have to fashion a locally flexible rule that adequately protects these icons of the Pacific Northwest, and we appreciate your expressed commitment to work with all affected parties to adopt rules that meet both the biological objectives of the species and the management capabilities of partner governments. With more than 75 percent of the state of Washington affected by ESA listings, finding any solution to the salmon problem must involve state, local, and tribal governments, private businesses, and the public.

Governor Locke's Joint Natural Resources Cabinet and the Salmon Recovery Office provide advice to the Governor and the Legislature on all matters affecting salmon. The Joint Natural Resources Cabinet participating agencies are the Departments of Agriculture; Ecology; Fish and Wildlife; Transportation; Community, Trade, and Economic Development; Health; Parks and Recreation Commission; Conservation Commission; Puget Sound Water Quality Action Team; Interagency Committee for Outdoor Recreation; and Northwest Power Planning Council. Together, we have developed Washington's Statewide Strategy to Recover Salmon. Your proposed rules have been evaluated against our own goal to "recover salmon, steelhead, and trout populations to healthy and harvestable levels and improve habitats on which fish rely." We also considered commitments we made in our strategy and our early implementation actions. We recognize our response may not be as clear and consistent as we would like because of the necessity to accommodate the views and concerns of all the agencies, but we offer to work with you in the coming months to resolve any confusions which may arise as you review these comments.

For the most part, we support the approach you are proposing and commend you for your efforts. However, we find many provisions of these rules to be unclear in their standards and criteria, and inconsistent in their approach to limits on "take" prohibition. To be useful to governments, conservation standards should be as specific as possible, their application must be fair and understandable, and the systems employed to implement them must be practical. It does not appear that your draft rules consistently meet these tests. In the enclosure with detailed comments, we have pointed out specific areas where these inadequacies occur.

The following is a summary of our comments:

- In these proposed rules, you have identified certain programs and determined that they contribute to the conservation of salmon in each of the Evolutionarily Significant Units (ESUs) or are governed by a program that adequately limits impacts on salmon. For these programs, you have proposed limitations on “take” prohibitions instead of a cumbersome case-by-case determination process to evaluate whether “take” is occurring. This approach is a powerful incentive for state, local, and tribal governments as well as private entities to develop and implement programs and activities that meet the requirements of the ESA. While the recognition of some of these programs may be appropriate, it is sometimes difficult for us to know specifically what standards and criteria you used to evaluate and determine that these programs do contribute to your goal of “properly functioning conditions.” Many, if not all, entities will want to use a program that clearly describes what is required to meet National Marine Fisheries Service’s (NMFS) needs, so we urge you to provide us with more definition in that area.
- A second category of limits on “take” prohibitions points to a “mechanism” for entities to receive assurances that activities are consistent with ESA. Again, we support your intent, but we are concerned about the possible unrealistic expectations created by this approach. For example, while it is vital for counties and cities to develop ordinances that adequately protect salmon habitat, it is impractical for NMFS to review and approve each individual ordinance. It is not an exaggeration to expect that over 1,000 ordinances could be submitted to NMFS for review and approval. We suggest instead you consider developing -- in partnership with other governments -- specifics that would be the basis for evaluating state programs that provide the guidance for local implementation.
- As you know, we have embarked on a major effort to develop a comprehensive agreement to address agricultural ESA-related concerns. NMFS’ continued participation in -- and support of -- the effort known as “Agriculture, Fish and Water” (AFW) is critical to its success, and we ask you to follow through with your previous commitments to acknowledge this forum in the rules.
- Of substantive concern to us is the relationship between these rules and recovery planning. The approaches, elements and standards associated with recovery plans are not clear at this time, and were not detailed in these rules. You do refer to “viable salmonid populations” (VSP) and “properly functioning conditions” (PFC), two documents related to recovery planning, to evaluate the benefits of conservation plans and activities. However, it is unclear how either of these related to the development of these rules and the limits on “take” prohibition, since VSP and PFC are not finalized. Consequently, we cannot interpret the extent to which the conservation standard that individual programs must meet under these rules may contribute to recovery, as required by the ESA.

- ❑ Furthermore, although we believe you have a commitment to regularly evaluate the effectiveness of the 4(d) rule conservation programs, it is not clear in these rules how you expect to use the results of evolving science to improve these rules in the future. Likewise, we are not sure how you intend to evaluate the cumulative effects of these limits on “take” prohibitions on salmon populations.
- ❑ Washington believes that there should not be a separate rule and a separate process to analyze the potential impacts of tribal activities on listed salmon. Existing and proposed mechanisms to analyze the impacts of actions and activities (i.e., Sections 7 and 10 of the ESA and the general proposed salmon 4(d) rules) afford the Secretary adequate and more appropriate mechanisms to analyze the impacts of proposed tribal activities in light of treaty rights and federal trust responsibilities. The utilization of these other mechanisms would encourage the appropriate (and in some instances, court ordered) cooperation and participation of all parties affected by a tribe's proposed activities. Conversely, the proposed tribal rule offers a secretive and exclusionary process with vague, undefined standards, the utilization of which will result in the creation of divisive relationships among the tribes, the states, and the regulating federal agencies. For these reasons, the state believes that the general salmon 4(d) rules should be universally applicable. In the event, however, that the Secretary persists in a desire to have a separate tribal rule, the rule should contain the same standards and requirements which the Secretary deemed necessary and advisable for the conservation of chinook, chum, coho, steelhead, and sockeye as they relate to the activities of non-Indian citizens.
- ❑ You comment (page 175 of the proposed chinook 4(d) rules) that you will be coordinating with the U.S. Fish and Wildlife Service (USFWS) during the current 4(d) rule process. However, through our experience, we see the possibility that NMFS and USFWS will define “take” and/or “limits on take prohibitions” differently for two different species regarding the same or similar actions. In this situation, it would be confusing and very difficult for agencies to tailor programs according to different sets of 4(d) rules. We urge you to maximize your efforts with USFWS to ensure this does not happen.
- ❑ The introductory “supplemental” material provided in some instances contains far more detail than the rule itself. While we understand the federal Administrative Procedures Act’s requirement for this supplementary information, we are unsure what the legal effects of this information might be. We urge you to revisit this section with affected governments, determine what material might be more appropriately moved to the rule, and clarify the intended effect of the remaining introductory material. Likewise, the documents you have incorporated by reference contain substantial information on practices that you have approved. This leads to uncertainty regarding treatment of subsequent amendments to these documents, so we ask that you address this in the rule.

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The detailed comments on the following pages provide substantial information regarding these concerns, as well as other issues that the Joint Natural Resource Cabinet agencies have identified. We hope you will find our comments useful, and we pledge to work with you during finalization of these rules. Thank you for this opportunity to comment on these proposed rules. We look forward to hearing from you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Curt Smith".

Curt Smith
Special Assistant to the Governor
for Natural Resources

Enclosures

cc: Washington State Congressional Delegation
Governor Dirk Kempthorne, Idaho State
Governor John Kitzhaber, Oregon State
Governor Marc Racicot, Montana State
Senator Karen Fraser, Washington State Senate
Senator Ken Jacobsen, Washington State Senate
Representative Jim Buck, Washington State House of Representatives
Representative Gary Chandler, Washington State House of Representatives
Gerry Jackson, U.S. Fish and Wildlife Service
Members, Joint Natural Resources Cabinet
Members, Government Council on Natural Resources

Joint Natural Resources Cabinet (JNRC)

Larry Cassidy, Member, Pacific Northwest Electric Power and Conservation Planning Council
Tom Fitzsimmons, Director, Department of Ecology
Jim Jesernig, Director, Department of Agriculture
Laura Johnson, Director, Interagency Committee for Outdoor Recreation
Tom Karier, Member, Pacific Northwest Electric Power and Conservation Planning Council
Jeff Koenings, Director, Department of Fish and Wildlife
Nancy McKay, Chair, Puget Sound Water Quality Action Team
Steve Meyer, Executive Director, Conservation Commission
Sid Morrison, Secretary, Department of Transportation
Busse Nutley, Deputy Director – Community Development, Department of Community Trade
and Economic Development
Cleve Pinnix, Director, Parks and Recreation Commission
Mary Selecky, Acting Secretary, Department of Health
Terry Williams, Tulalip Tribes

Government Council on Natural Resources

Representing State Government:

JNRC members (see above)

Representing the Counties:

LeRoy Allison, Commissioner, Grant County
Louise Miller, Council Member, King County
Paul Parker, Policy Director – Environment, Land Use & Resources, Washington State Association of
Counties
Gordon Reed, Commissioner, Asotin County
Dave Somers, Council Member, Snohomish County

Representing the Cities:

Gerald Baugh, Project Manager, City of Vancouver
Steve Jenkins, Mayor, City of Bridgeport
Chuck Mosher, Deputy Mayor, City of Bellevue
Dave Williams, Municipal Government Analyst, Association of Washington Cities
Debbie Young, Natural Resources Manager - Tacoma Public Utilities, City of Tacoma

Representing the Ports:

Eric Johnson, Environmental Affairs Director, Washington Public Ports Association

Representing Federal Agencies:

Mike Grady, Senior Policy Analyst, National Marine Fisheries Service
Julie Hagensen, Director – Washington Operations Office, Environmental Protection Agency
Dale Hom, Forest Supervisor, US Forest Service
Gerry Jackson, Supervisor US Fish & Wildlife Service
Bob Turner, Washington Area Director, National Marine Fisheries Service

Representing the Tribes:

Jim Anderson, Executive Director, Northwest Indian Fisheries Commission
Billy Frank Jr., Chairman, Northwest Indian Fisheries Commission
Lynn Hatcher, Fisheries Manager, Yakama Indian Nation
Harlan James, Policy Representative, Lummi Nation
Merle Jefferson, Natural Resources Director, Lummi Nation
Jim Jorgensen, Fisheries Manager, Hoh Tribe
Georgiana Kautz, Fisheries Manager, Nisqually Tribe
Bob Kelly, Fish Commission Chair, Nooksack Tribe
Lorraine Loomis, Fisheries Manager, Swinomish Tribe
Mel Moon, Fisheries Director, Quileute Tribe
Jim Peters, Natural Resources Director Squaxin Island Tribe
David Whitener, Tribal Chair, Squaxin Island Tribe
Bill Yallup, Sr., Chair, Yakama Indian Nation

Representing the Legislature:

Senator Harriet Spanel, Washington State Senator
Senator Dan Swecker, Washington State Senator
Representative Kelli Linville, Washington State Representative
Representative Dave Mastin, Washington State Representative
Representative Debbie Regala, Washington State Representative

Detailed Comments from Washington State Agencies

I. Comments applicable to both Steelhead and Chinook/Chum/Coho 4(d) Rules

A. General Comments and Issues:

1. Conservation standards need to be clearly defined.

The basic premise of these rules is that, while Section 9 prohibitions are applied to all activities affecting listed species, several activities are exempted from take prohibition because the Secretary of Commerce (Secretary) has deemed that these programs will contribute to the conservation of threatened species. However, the rules do not define the standards the Secretary is using to evaluate the adequacy of these programs or activities. We find the overlapping application of Section 10 incidental take permit criteria and the Section 7 jeopardy standard used in these 4(d) rules to be somewhat confusing and perhaps inconsistent. For example, the draft 4(d) rules reference the following Sections 7, 10, and 4(d) criteria, and standards, which will be used for the limits on take prohibitions:

- *"...contribute to conserving the species or adequately limit impacts on listed salmonids"*
- *"...provide adequate safeguards for listed species. Furthermore, extension of take prohibitions to the activities would not provide meaningful, increased protection for listed species"*
- *"...adequately address the conservation needs for listed ESU's"*
- *"...deemed necessary and advisable to provide for the conservation of the species"*
- *"...restrict application of take prohibitions where land and water management activities that are conducted in a way that will help attain or protect properly functioning habitat"*
- *"...protect and restore the functions and value of the habitat"*
- *"...not appreciably reduce the likelihood and survival and recovery of threatened ESUs."*

We believe it would be helpful to local and state government entities and others as well if NMFS would provide a detailed explanation of why it is using these ESA Section 7, 9 and 10 tools in this fashion and how they relate to each other. We ask that you clarify in the rules the conservation standards used to approve a limit on take prohibition under the 4(d) rules.

While NMFS is in the process of developing scientific standards that will more fully define the concept of properly functioning habitat conditions (PFC), some standards need to be set out in the rules by which NMFS can evaluate whether land and water management activities adversely impact salmonid habitat. The criteria provided to assess whether habitat conditions are "properly functioning" should be based on the conservation standards and should be as specific as possible to be useful. One major area of concern we have with the existing PFC criteria is the apparent omission of estuarine and marine habitat biological requirements of salmonids. We believe that the salmon and steelhead 4(d) rules need to be significantly strengthened with regard to the types of protective and restorative measures in estuarine and marine habitats that are necessary to ensure recovery of salmonid stocks.

The legal scope of the rules also should be clarified. Many of the proposed limits on take prohibitions are for statewide programs and activities. The fact that NMFS approves a statewide program under a limit on take prohibitions for threatened species in these 4(d) rules does not mean that the activities are covered if they impact **endangered** species.

2. Some limits on take prohibitions need to promote program approaches.

Thirteen specific programs receive limits on take prohibition with these rules. These programs range from very broad (Washington's Forest and Fish Agreement) to very narrow (Portland Parks Integrated Pest Management Program). We understand you are proposing that similar programs cannot simply model themselves after the exempted program ((e.g. Oregon Department of Transportation (ODOT) road maintenance)), but must also secure the future endorsement of NMFS, and the specific program must be "noticed" in the Federal Register, in order to qualify for the limitation on the take prohibition. Additionally, at present there is no defined review process on how a program gets included for limits on take prohibition other than on a case-by-case basis. NMFS needs to articulate in the rules how the Agency intends to prioritize the review of the requests for limits on take prohibitions.

Taken to its logical conclusion, the course NMFS is proposing to adopt will generate a paper avalanche as different entities, large and small, scramble to promulgate various "plans" described in the rules and seek approval from NMFS. NMFS could be reviewing stormwater programs, shoreline management programs, road maintenance programs, pesticide programs, etc., for every jurisdiction in the covered ESUs. It is not an exaggeration to estimate that over 1000 state and local programs could be submitted to NMFS for your review and approval.

We recognize and respect the fact that some local governments may wish to develop and present to NMFS their own proposals for programs or activities they feel will provide for the conservation of listed salmonid species and that should qualify for a limit from the take prohibitions. We also recognize that many local governments do not have the resources to develop these proposals. They may desire to use an accepted program as a model or prefer to have their programs or activities covered through a programmatic approach. Accordingly, we suggest that NMFS considers developing, in partnership with local and state governments, as appropriate, specific guidelines, standards and criteria which would be the basis for evaluating state programs that provide the guidance for local implementation. The state could then work with local governments and NMFS to evaluate local programs and develop a determination of compliance with the approved state guidelines.

This approach is consistent with the "Statewide Strategy to Recover Salmon, *Extinction Is Not an Option*." The Strategy promotes the use of programmatic and watershed approaches instead of case-by-case processes. Existing regulatory and non-regulatory programs are revised as necessary, based on best available science, and to achieve properly functioning habitat conditions established by NMFS. The 4(d) rules, under this approach, would set clear guidance and criteria for adequacy in order to obtain limits on take prohibitions. Criteria would address the requirements for substance, certainty of implementation, performance standards/targets, monitoring, and adaptive management. We currently are discussing this approach with NMFS regarding stormwater programs and shoreline master programs. We would like to continue to

work with you on this programmatic approach not only for shorelines management and stormwater programs but for other state programs, as appropriate.

3. Definitions of broad terms used in the rules need to be included.

We find the proposed rule to be excessively broad so as to leave room for diverse interpretation and great gaps in understanding the implications of the rules. An example of that broadness is the use of the words "urban development" in section 2.D of the Take Guidance on page 172. This is subject to multiple interpretations. Undefined, this broad usage could apply to new home building, remodeling/expanding an existing home or building, and any supporting infrastructure such as sewer, water and street systems. In comparing the Take Guidance in the draft rules to NMFS' recently-promulgated rule defining "harm" and NMFS' interim 4(d) rule on Coastal Coho for northern California and southern California and southern Oregon, we note that these draft rules appear to be the first time NMFS explicitly refers to "urban development" as a land use activity that may constitute a take. Previous definitions of take included logging, grazing, farming or road construction in riparian areas as examples, but did not include urban development.

Another example of an open-ended term is the use of the word "excessive" stream temperatures in section 2.B of the Take Guidance on page 172. These are just two examples; others are noted in our specific comments section.

4. Relationship between the recovery planning and the 4(d) limits on take prohibitions should be addressed.

The rules should state how the programs and activities covered under the proposed limits will be evaluated, once the viable salmonid population (VSP) structures and population levels are defined for each Evolutionarily Significant Unit (ESU). The implication if any, on the limits on take prohibitions outlined in the proposed rules should be outlined: For example, would NMFS re-evaluate, amend, or remove the limits on take prohibitions once the VSP is defined?

5. Cumulative impacts of proposed limits need to be assessed and addressed.

We are concerned about the cumulative effects of these proposed take limitations on populations of threatened salmon. We request that NMFS further clarify how cumulative impacts of all activities covered by the 13 limits on take prohibitions will be monitored and assessed. Meaningful assessments of cumulative risk at an ESU level will require a linkage between Viable Salmonid Populations (VSP) and Properly Functioning Conditions (PFC), and the development of a common method for evaluating the effects of activities on populations and habitats. NMFS should also define how and when opportunities will be provided for public review and comment on ESU-wide assessments of the cumulative levels of take occurring under all take limitations and/or take authorizations affecting listed salmonids.

6. Several programs and activities need to be recognized in the 4(d) rules either under one of the proposed limits on take prohibitions or separately.

We are concerned about the lack of recognition of the Conservation Reserve Enhancement Program (CREP), a program developed and conducted in partnership with the federal Farm Service Agency (FSA) and Natural Resource Conservation Service (NRCS). This appears to be inconsistent with earlier assurances that certainty would be provided either through the

consultation process under section 7 or in the 4(d) rules. In a May 14, 1999 letter from the Regional Administrator, Will Stelle, to the Natural Resources Conservation Service (NRCS), NMFS confirms that certainty could be provided by NMFS to the Farm Service Agency (FSA) and participant landowners enrolled in the CREP -riparian buffer area. Therefore, we request you include the CREP program in the 4(d) rules and provide a limit on take prohibitions to landowners participating in the program consistent with the NRCS riparian buffer area.

The Agriculture, Fish & Water forum is a negotiated process involving the agricultural community; local, state, federal & tribal governments; and environmental groups. Its goal is to address the impacts of agricultural practices on salmon. Your continued participation and support is essential to the success of the effort. We request that you acknowledge this forum in the rules.

Efficient and effective implementation of both the Clean Water Act (CWA) and the ESA will be necessary for both the state and NMFS to be successful in carrying out our respective responsibilities to restore the biological integrity of the region's waters. We believe the goals of the CWA can complement those of the ESA: protection and restoration of beneficial uses of the state's waters through the CWA will aid in the protection and restoration of endangered and threatened salmon stocks. The CWA does provide a very powerful regulatory framework within which many ESA issues can be effectively addressed. The federal CWA framework provides an ideal opportunity for a programmatic approval, which will substantially improve the effective implementation of the ESA. The CWA framework provides:

- An effective implementation mechanism through the use of permits, Total Maximum Daily Load (TMDL) (or water clean up plans), and established nonpoint pollution control programs;
- An on-going and established monitoring and performance evaluation program through the use of permits and water clean-up plans; and
- An adaptive management/feed back process which is embodied in five year permits, the re-evaluation of the state water quality standards on a triennial basis and in TMDL implementation plans.

The rules should create an incentive for full compliance with the CWA, including TMDL water clean up plans. You should also consider including in the limits on take prohibition under part 223.203(b), activities pursuant to and in compliance with the federal Clean Water Act: including, but not limited to, section 401 water quality certifications and permits issued pursuant to section 402 of the Act.

We have identified in our specific comments on various limits on take prohibitions (our section C that follows) other programs and activities that need recognition or acknowledgement in the 4(d) rules. These include the State's Aquatic Plant Management Program, Noxious Emergent Weed Management Program, Road Maintenance Program, and Shorelines Management Program.

7. Relationship between supplementary information and the rules and the amendment process for documents incorporated by reference need to be clarified.

In some instances, the supplementary or introductory information provided by NMFS contains more detail than the rule itself. The information is provided to satisfy the federal Administrative Procedure Act (APA) requirement for a “concise general statement of (the rule’s) basis and purpose,” yet we believe some of the material would be more appropriate in the actual rules. We would like to work with you to determine what material might be more appropriately moved to the rules.

The federal APA allows incorporation by reference of documents. However, when the document creates new legal rights or duties, it is considered a “substantive rule.” As such, it must be either published in its entirety in the Federal Register, or be both (1) “reasonably available” and (2) incorporated by reference with the approval of the Director of the Federal Register. Therefore, you should clarify how subsequent amendments to these referenced documents will be treated.

8. Legal implications resulting from the difference between NMFS's approach of tailoring limits on take prohibitions and USFWS's generic 4(d) Rule.

We have a concern with the divergence of approach between NMFS and USFWS. While these are two separate agencies, we feel it is in the interest of the public and the resource for these two agencies to coordinate their efforts – and bring them as close together as possible in the areas of ESA regulation. On their present course, it is possible we could have a situation where an activity is limited from take under NMFS but is subject to take under USFWS. We will be working with the USFWS to provide proposals for exemptions that could be included in their 4(d) special rule.

9. Other general comments

Substantial reporting and monitoring responsibilities are imposed upon state agencies and local jurisdictions under these proposed 4(d) rules. The levels of annual reporting, and monitoring required by the proposed 4(d) rules are beyond the capabilities of agencies as currently funded. While some of the monitoring requirements are appropriate, we feel NMFS’ approach creates an overly fragmented administrative situation in the case of “continuity” and “consistency” of monitoring activities. Given the great value of new knowledge and information generated from monitoring, NMFS should protect against taking listed species while at the same time foster the acquisition and integration of critical new information and learning. The present proposal discourages local jurisdictions and state agencies due to a fragmented, uncoordinated administrative process with no apparent pathway for integration and synthesis. Numerous monitoring requirements will undoubtedly involve the same monitoring activities, so the rules should include a requirement for consistency in monitoring efforts and a process to streamline, integrate and synthesize the tremendous amount of information that will be generated from monitoring and reporting requirements. We would like to work with you on this effort.

Finally, we are not comfortable with an approach that appears to delegate ESA enforcement/implementation responsibility to state entities. Any activities that are proposed to address ESA issues will require considerable discussion among the governments that are affected to ensure our legal and funding needs are met.

B. Specific Comments and Issues

1. Take Guidance

General:

Since activities listed in the three categories of take are not exhaustive, readers of the rule are left with some question about whether their unlisted activity might be considered a take, and if so, under which category it would fall (i.e. likely to enforce or not). We recommend you add a short description for each category of take that defines how NMFS will determine where a certain activity would fit.

As stated earlier, the take guidance sections need to define some of the more open-ended terms used. In defining "excessive" stream temperature in 2.B, NMFS should link the definition to water quality standards or other defined salmon temperature requirement. The same reference to water quality standards should be provided in 2.G, "pesticides ... that adversely affect the biological requirements of the species ..." to reduce the uncertainty.

Guidance Section 1

E., Blocking fish passage through fills, dams, and impassable culverts:

NMFS doesn't indicate whether this applies to new or existing culverts, so it is not clear that take can be applied to an existing barrier which may have been in place for many years. This needs clarification.

The Departments of Fish and Wildlife and Transportation have been conducting inventories and correcting fish passage barriers associated with state highways and other structures since FY 1991. To date more than \$1.3 million have been spent to inventory, conduct habitat studies, and prioritize fish passage barriers on state routes. About \$43 million will be spent over a 20-year period. It is well understood, however, that completion of this program will take significant time. Given that Washington State has made major commitments to implement a program to identify, prioritize and correct fish passage barriers associated with roadways, it would be counterproductive to take enforcement actions under take prohibition.

Guidance Section 2

A. Water withdrawals

The take guidance correctly identifies several factors affecting streamflow. There should be some acknowledgment that other significant factors such as dams, distribution systems, and land use practices have major effects on flows.

The state plans to manage its Water Resources Program consistent with the Statewide Strategy to Recover Salmon. In summary, we will use local watershed planning to develop watershed conservation plans which:

- Set instream flow levels to meet fish needs.
- Establish and implement water restoration plans to put water back into streams using:
 - water conservation and water reuse projects,
 - water rights permit actions,
 - hydro-power relicensing conditions,
 - technical assistance and enforcement, and
 - water leases, purchases and trust water donations
- Deny new water rights in water-short basins with fish, pending an approved watershed plan and/or water restoration plan.

Unfortunately, the guidance and rules lack the clarity needed for us to determine whether or not the Washington State Water Resources Program is operating consistent with the proposed rules.

C. Habitat alteration (e.g. removal of large woody debris)

While there are several references to stream and riparian habitat, there is no specific reference to lacustrine, marine and estuarine shorelines (other than a reference to “tidal channels” in 2.C). NMFS needs to list specific examples of activities on marine, estuarine, and lacustrine shorelines that “very likely,” “may,” or “may collectively” injure or kill listed salmonids. In particular, NMFS should specifically address shoreline armoring, over-water structures (e.g. docks and piers), and log rafting.

We note in your final designation of Critical Habitat for the 19 ESUs affected by these rules, published in the Federal Register on February 16, 2000, NMFS has revised its designation for both freshwater and estuarine critical habitat to include riparian areas. We recommend that NMFS includes a reference to that designation (Sec. e.g., 65 FR 7773, February 16, 2000) (critical habitat designation) after the words functional elements under C.

D. “Land-use activities”

This category seems too general in comparison to some of the other activities listed. The category needs elaboration, and should at least list the actual factors limiting the habitats – sediment inputs, shading, etc.

G. Pesticide and herbicide applications

This prohibition is very broad and fails to adequately explain what criteria led NMFS to exclude, for example, the pesticide program included in the Washington’s Forests and Fish Report (FFR).

In addition, the draft rules imply that the current regulatory system built around the federal pesticide label and enforced by the Environmental Protection Agency and state regulatory agencies is not adequate to protect salmon. Therefore, the rules fail to recognize the important role pesticides can play in controlling noxious or invasive weeds to protect and restore salmon habitat; specifically, the careful use of pesticides is an important tool in removing non-indigenous species (spartina, noxious weeds, etc.) from salmon habitat. We are led to the conclusion that individual integrated vegetation management programs will have to stop and develop a section 10 incidental take permit; is this accurate? Also by failing to grant 4(d) coverage to specific strategies that go well beyond the federal label requirements to protect listed species, NMFS has sent an alarming signal to many state and local entities that their integrated pest management strategies to eradicate invasive exotic species may not be acceptable.

We believe that in the majority of cases, pesticide applications made following the federal label, state regulations, and specific permit conditions provide necessary protection to the environment, including salmon and their habitat. We recognize that in some cases it may be necessary to impose restrictions beyond the federal label and current state regulations. We are more than willing to work with the NMFS on specific issues where this may be needed. We have the regulatory authority to impose additional requirements. In the interim period, we suggest that pesticide applications made in accordance with the federal label, state rules, and specific permit

conditions that may be in effect should be exempt from take. (See related comment on the 11th Limit on take prohibitions, recommending the inclusion of the state Aquatic Plants Management Program in that limit.)

Guidance Section 2: Additional category

We suggest the following addition to the category of activities that may injure or kill salmonids:
J. Releases of water from impoundments that alter flow regime and consequently disrupt behavior of listed salmonids.

Guidance Related to Water Quality

Guidance 1.D refers to illegal discharges, particularly without a permit. Guidance 2.F refers to permitted discharges exceeding discharge limits for salmonid critical parameters, particularly where receiving waters are not meeting standards (303(d) listed waters). Guidance 3.A refers to discharges within permit limits to receiving waters meeting standards.

Guidance 3.A “leaps over” two general situations that would be of more concern from a water quality/salmonid standpoint. Situation 1 can be described as “discharges to streams on the 303(d) list even when the discharge is in compliance with its permit.” Situation 2 can be described as “non point sources discharging to streams on the 303(d) list.” These two situations should be included in guidance 3 as examples of take from cumulative impacts.

The take guidance implies that discharges to streams that are meeting water quality standards and that are in compliance with current National Pollution Discharge Elimination System (NPDES) permits when taken collectively could cause significant impact on salmon and therefore should be modified where possible to reduce the potential for cumulative impacts to salmonids. We have a concern with this take guidance. We believe where problems exist, we have the ability to address these problems through changes to the water quality standards, use of TMDLs (or water clean up plans) and the NPDES permit program. We encourage NMFS to continue to work with us on the update of the water quality standards, which are key to meeting water quality needs of salmonids.

Guidance Section 3: additional information

NMFS needs to state how the Agency will identify additional activities that may collectively impact salmon in future rule amendments.

2. Aids for Understanding the Limits on the Take Prohibitions

Issue 2: Population and Habitat Concepts.

As stated above we suggest that NMFS spell out the specific criteria for achieving properly functioning freshwater and estuarine habitat conditions in the section on "Evaluating Habitat Conditions" on pages 174 and 73483, in addition to listing them with each habitat-related limit on take prohibition. As stated above we suggest that NMFS spell out the specific criteria for achieving properly functioning freshwater and estuarine habitat conditions in the section on "Evaluating Habitat Conditions" on pages 174 and 73483, as well as listing them with each habitat related limit on take prohibition. In our review of each proposed habitat-related limit on take prohibitions, we sometimes found it difficult to clearly identify the criteria NMFS used to evaluate and

determine that programs or activities contribute to "properly functioning habitat conditions". This additional clarification will improve the guidance provided for state, local, and tribal governments and private entities to evaluate the impacts of their actions and to design programs/activities that would contribute to conserving the species or adequately limit impacts on the habitat functions.

Issue 5: Regular Evaluation of Limits on Take Prohibition.

We support NMFS' commitment to regularly evaluate new information and the effectiveness of programs related to the proposed limits on take prohibition. We also believe NMFS should identify ways in which the program may need to be strengthened. However, we do not support the process you have outlined for jurisdictions that do not make changes to your satisfaction. We believe your proposal would create an unnecessary and unfair situation that may discourage jurisdictions from initially undertaking the programs necessary to qualify for a given limit on take. We suggest that a more appropriate response by NMFS in such a situation would be to publish its intention to specifically withdraw the relevant limit on prohibition of take from the jurisdiction that is not in compliance. If the limit for a specific jurisdiction is subsequently withdrawn, the relevant take prohibitions would then apply to that program or activity just as to any other similar activity. The provisions throughout the 4(d) rules that would apply to this situation should be changed to provide procedures for the formal withdrawal of limits on prohibition of take.

C. Permit/ESA Limits on Take Prohibitions

(1) Activities Under Section 10 Permits

No comments at this time.

(2) Continuity of Scientific Research

The relationships and distinctions among processes allowing ongoing scientific research, and the limit on take for scientific research, are unclear. We suggest you consider integrating these limits. In addition, please clarify how the scope of the continuity of the ongoing scientific research permit process does or does not pertain to the broad range of ongoing state agency and University scientific research activities. Additional comments related to scientific research are provided under (7) below.

(3) Rescue and Salvage Activities

The relationship of the limit for rescue and salvage activities regarding the use of electroshocking methods needs to be clarified. Currently, the state Hydraulic Project Approval (HPA) may require use of electroshocking techniques. However, NMFS has strongly questioned the use of electroshocking sampling techniques. Although the use of electroshocking is clear in *Limits on the Take Prohibitions for Scientific Research*, we request that its use be clarified for rescue and salvage activities. For example, we suggest that the limit on rescue and salvage activities should allow coverage of Washington Department of Transportation's Best Management Practices (BMPs) requiring the removal of fish or aquatic organisms that are trapped in a pond, ditch or channel.

(4) Fishery Management

This section provides clear, specific and detailed guidance for evaluating the activities and approving the limits on take. We suggest NMFS follows the same outline for the other limits.

The section of the steelhead rule outlining criteria for evaluating Fishery Management and Evaluation Plans (FMEP), subsection 4 (page 73486) states that “sanctuaries must be provided for listed steelhead, in which fishing is not allowed and no hatchery-produced, non-listed steelhead are present”. This paragraph goes on to further describe features of sanctuary areas. There is no language about sanctuary areas in the chinook/chum rule. NMFS should clarify the biological basis for this discrepancy; if it is a valuable approach that “must be provided” for steelhead, it should also apply in the chinook/chum rule.

Several of the criteria proposed for evaluating FMEPs reference a number of principles from NMFS’ draft “Viable Salmon Populations” (VSP) paper. We certainly agree with the requirement that proposed management actions recognize significant differences in risk associated with populations at different abundance and status thresholds. In fact the state fish and wildlife agency has been developing year 2000 Puget Sound comprehensive chinook framework objectives for immediate Section 7 consultations that acknowledge the need to address these concepts. However, the VSP paper has not yet been finalized, and there would seem to be significant overlaps in the provisions noted in the 4(d) rules with current work to develop salmon recovery goals in a coordinated process among NMFS, the state, and the tribes. It seems illogical that 4(d) rules could be provisioned to be specifically compliant with a draft paper for which a review of the scientific adequacy and an evaluation of its appropriate connection to development of recovery goals have yet to be completed. The state Department of Fish and Wildlife (WDFW) will be providing formal comments on the VSP paper and definitions in a separate letter.

Many Washington state salmon fisheries are planned in conjunction with the Pacific Fishery Management Council process. Similarly, Columbia River fisheries are conducted under the auspices of the Columbia River Compact. In the past, these fisheries have obtained take authorizations through a Section 7 Incidental Take Statement or Section 10 permit. Under the proposed 4(d) take limitations, it is unclear if these fisheries will continue to require an authorization for incidental take under Section 7 or Section 10, or if an FMEP will be required. Many of these fisheries will affect both threatened species, which are included under the proposed 4(d) rules, and endangered species, which are not. Although the 4(d) rules explicitly provide a limitation for activities covered by a Section 10 permit, there is no such limitation for activities covered by an Incidental Take Statement under Section 7. The state seeks to avoid duplication in determining the adequacy of harvest plans with regard to ESA. Therefore, we assume that if fisheries are subject to Section 7 consultations, NMFS will not require additional review under the 4(d) rule. And similarly, if a FMEP is approved by NMFS for fisheries affecting only threatened species, we assume no further level of federal review would be required. NMFS should clarify this in the final rules and describe how the proposed 4(d) take limitations would affect any Section 7 consultation requirements for fisheries with a federal nexus.

The criteria concerning the importance of reviewing annual abundance data and periodic population parameters are mentioned in determining possible adjustments needed in harvest regimes. The temporal frequencies of such reviews need to be tailored to the annual or cyclic

variability that has been naturally observed in the parameters involved so that such reviews do not lose focus on the underlying long-term population trends that represent the true population response.

We support the requirement for the state to display a biologically based rationale for its proposed harvest strategies, but we wish to emphasize that it cannot be a replacement for NMFS' statutory obligation under the ESA to determine the likelihood of whether or not a plan will impede recovery.

The ninth criterion references the requirement of joint agreement for certain state/tribal plans. The wording of this section implies that plans only exist under agreement, and would only be covered under these take limitations if agreed to by the state and tribes. The definition of "agreement" needs to be expanded to address plans that are finalized by the use of appropriate dispute resolution mechanisms, as provided for in existing agreements and stipulations, to more accurately portray the co-managers' obligations under *U.S. v. Washington*.

The proposed take limitations require that fisheries be monitored and that takes of listed species be reported to NMFS annually. Some of this information is neither accomplishable presently, nor seems essential to monitor the compliance of the FMEP toward meeting its goal. For example, estimates of harvest and the take of listed species may not be available for all fisheries within a one-year time frame. Specifically, many Washington recreational catch estimates are not available until two years after the season has ended. Similarly, stock-specific estimates of the level of catch of listed species in mixed-stock fisheries will require some fairly rigorous analysis of the catch data, much of which may not be available for one to two years after the fishery has concluded. We recommend that placeholder language be inserted here pending further discussions between NMFS and the state to develop specific reporting requirements that are both reasonable given current staff resources and necessary to evaluate the adequacy of the FMEP. For related comments, see #5 and #7 below regarding artificial production and scientific research.

The state Department of Fish and Wildlife is responsible for harvest-related activities that may have little if any expected impact on salmonids (e.g., warmwater and trout fisheries). We recommend NMFS provides either a mechanism under the 4(d) rules or otherwise to expedite reviews of these activities, perhaps in lesser detail than required in a FMEP and obtain NMFS' concurrence that these activities do not present a taking of listed salmon.

In the proposed steelhead rule on page 73487 (9), FMEPs are expected to include appropriate restrictions on fisheries for resident species. However, the need and approach for such restrictions are not mentioned in the supplementary information for the proposed chinook/chum on page 177 (9). The basis for this discrepancy should be clarified or similar language should be added to the chinook/chum rule.

(5) Artificial Propagation

Our concern as noted above in (4) regarding the preliminary nature of the draft VSP document also applies here. We reiterate that while we support the VSP document's purpose and intent, it seems illogical that final 4(d) rules could be provisioned to be specifically compliant with a draft

paper for which a review of the scientific adequacy and an evaluation of its appropriate connection to development of recovery goals have yet to be completed. Again, we will be providing formal comments on the VSP paper and definitions in a separate letter.

In the supplementary information on page 177 (5) of the proposed chinook/chum rule, under *Genetic and Ecological Effects*, the needs to “avoid” or “minimize” any deleterious genetic or ecological effects are identified. However, in the rule language on page 192 (E) the terms “evaluate, minimize, and account for” are used. We suggest that discrepancies between supplementary language and rule language be resolved by adding the word “avoid” after “evaluate” on page 192.

We ask that NMFS clarifies why there are differences between the proposed chinook/chum and steelhead rules with regard to the “Take of Progeny Resulting from Hatchery/Naturally-Spawned Crosses” sections (italicized subheading; page 178) under the **Criteria for Evaluating Hatchery and Genetic Management Plan** section in the chinook/chum proposed rule, and the bold-face subheading (page 73487) section in the steelhead rule. We suggest they should be the same and prefer the chinook/chum language. If you decide they are not the same, you should provide a rationale for the differences.

In both proposed rules, NMFS expresses that it is desirable to use naturally-spawned fish in hatchery populations to minimize differences between hatchery and wild populations. NMFS also identifies conservation as the top priority for the use of hatcheries, while acknowledging as lower priorities other benefits (e.g., harvest) of the use of hatcheries. Both rules point to the need for NMFS-approved Hatchery Genetic Management Plans (HGMPs) that would describe objectives and protections built into hatchery programs.

NMFS should provide guidelines or standards regarding opportunity for harvest of progeny of natural and/or natural/hatchery crosses. As implied in the steelhead rule, harvest of these progeny can occur once the appropriate component of the progeny is formally delisted (no take liability). What about harvest before formal delisting, especially if abundance is high? There is no mention of delisting such progeny in the chinook/chum rule. Is delisting an option for steelhead but not for chinook/chum? To what extent will take of natural or natural/hatchery progeny be illegal in commercial and/or sport fisheries? The incentive for use of natural fish in hatchery programs related to harvest opportunity where abundance of their progeny is high should be the same for both rules. Relationships between the artificial propagation and fisheries management components of the proposed rules should be clarified, where such progeny are concerned.

We request clarification regarding what the (Memorandum of Agreement) MOA between WDFW and NMFS will require to ensure “proper implementation” of the HGMPs. As it occasionally becomes necessary to modify hatchery planned production levels or operations, or as new recovery initiatives are begun, HGMPs may need to be modified or developed. The proposed rules do not address the procedure for this; presumably the MOA will allow for ease in modifying or adding HGMPs.

The rules should clarify the relationships and approaches regarding how changes in hatchery programs or FMEPs will be incorporated into any other take permits. Changes in hatchery plans,

for example, will happen routinely as WDFW reviews programs and implements new directions, whether for recovery purposes or otherwise. We suggest incorporating a protocol for these changes into annual reports that will address state modifications in such a way that 4(d) rules or Section 10 permits will not have to be rewritten.

The proposed rules make very little mention about expectations as to the extent of annual reports for HGMPs. We suggest annual reports should not simply repeat information already submitted; rather, they should focus only on changes to programs and the consequences to listed fish. Pertinent, accurate, and brief descriptions of changes in relation to baseline approaches should be the focus, and used perhaps as an annual addendum. We recommend placeholder language be inserted here pending further discussions between NMFS and WDFW regarding the necessary reporting requirements to ensure the annual reports are both accomplishable and adequate to evaluate the adequacy of the HGMP toward meeting its goals.

(6) Joint Tribal/State Plans

We support the proposed take limitation for joint state/tribal resource management plans developed by the co-managers within the continuing jurisdiction of *U.S. v. Washington* and *U.S. v. Oregon*. We believe these joint plans are integral elements of recovery plans for Washington state and Columbia River salmonid stocks. Our specific comments on limits # (4) Fishery Management and # (5) Artificial Propagation apply also to this limit on take prohibitions.

(7) Scientific Research Activities

This limitation exempts research activities of state fish and wildlife agencies (WDFW in Washington state), subject to certain reporting requirements, but does not address research conducted by other state agencies and universities that may result in the take of listed species. In Washington state, for example, the Departments of Ecology, Natural Resources, and Transportation, among others, and universities may conduct some research or monitoring activities that could result in take of listed salmonids. In addition, there are other research activities in which WDFW is involved as one of many cooperators. Also, as co-managers the tribes have the authority to conduct scientific research activities.

We request clarification about the intended application of this scientific research take limitation to other state agencies and universities, along with their associated reporting requirements and mechanisms. The limitation needs further clarification as to how these activities would be addressed: who would have reporting responsibility in these circumstances and who would be liable for any take that might occur?

The proposed rules do not define what is meant by “research.” For example, it is not clear to what extent monitoring (e.g., water quality sampling, macroinvertebrate analysis) may be considered research. We request that research be defined in the final rules.

Although NMFS has treated scientific research the same way in both the steelhead and chinook/chum proposed rules, the approaches used in these limitations are confusing. For example, there are at least two sections specifically addressing scientific research (“Continuity of Scientific Research” e.g., page 175 in chinook/chum rule; and “Limits on the Take Prohibitions

for Scientific Research” e.g., page 178 in the same rule). Clarification and streamlining is warranted.

In addition, there are numerous requirements for “monitoring” in the contexts of FMEPs and HGMPs. Monitoring activities in many cases will undoubtedly involve the same on-the-ground activities as “scientific research” activities. Definitions distinguishing between scientific research and monitoring must be provided. In some (perhaps many) cases, research and monitoring may not be distinctly different. In addition, we feel NMFS’ approach creates an overly fragmented administrative situation: in the case of “continuity” a scientific research permit will be required within a specific period of time; and in the case of “limits,” which are apparently applicable only to the activities of (or under the auspices of) state fishery management agencies, a separate monitoring and reporting process is created.

NMFS should clarify the distinctions among all types of research and monitoring, and clarify which administrative pathways must be used for each. It is important for the pathways to foster the acquisition and integration of critical new information and learning, not discourage it through a fragmented, uncoordinated administrative process with no apparent pathway for integration and synthesis.

One area of major concern is how the proposed rules address research conducted by non-state parties under scientific permits now issued by the state. Currently, WDFW Scientific Permits are issued with provisions placing the responsibility for complying with federal permits upon the permittee. As appropriate, copies of issued Scientific Permits are provided to NMFS and USFWS. As we understand the language in the proposed rules, in order to qualify for this take limitation, non-state parties conducting research on listed species under a WDFW Scientific Permit would not need to apply for a NMFS permit. Instead, the resulting additional permit workload would be shifted from NMFS to WDFW with the requirement that an annual report be submitted by WDFW to NMFS.

While this may help streamline the Scientific Permit process for applicants by eliminating the need for a federal permit, it would result in a significant increase in workload for WDFW by requiring the results of the research conducted under each applicable permit to be summarized and the incidental take under each permit to be compiled. Further, a report listing all scientific research activities permitted by WDFW that may incidentally take listed salmonids during the coming year would need to be prepared, and some level of monitoring for compliance with permit conditions would need to occur to ensure that research activities are conducted in accord with permits issued by WDFW.

Additionally, it is unclear if NMFS would impose additional permit review requirements upon state agencies. Currently, NMFS’ permit applications are widely reviewed within NMFS prior to publication in the Federal Register to solicit public comment. This type of public review process is not currently used by WDFW, and if required, would add further to the workload associated with this proposal.

We question the apparent delegation of permit authority from NMFS to the state for research activities that may incidentally take listed salmonids, and are opposed to the proposal being

published without adequate discussions of implementation issues having occurred with the affected state agencies. In addition to concerns about legal implications, the new reporting requirements under the proposed 4(d) rules would have significant staffing impacts to the state and could compromise our ability to issue Scientific Permits in a timely manner. Further discussions are needed between the Department of Fish and Wildlife and NMFS to address the outstanding financial and legal issues associated with this proposal.

Concerning submission of “*an annual report listing...activities planned for the coming year, for NMFS’ review and approval,*” we request that a time limit be provided within which NMFS would review state research proposals and plans. If NMFS is not bound by regulations to provide reviews in a timely manner (e.g., within 90 days), delays in the review process could undermine the ability of the state and others to perform needed scientific work. The rules should provide for a mechanism to revise the annual report for planned activities if conditions change during the year that warrant the revision.

(8) Habitat Restoration Limit

We are concerned that two years is too short a time frame to develop a suitable watershed conservation plan. The subsequent imposition of Section 9 take prohibitions and the potential requirement for Section 10 permit coverage after two years will become a disincentive for good restoration work. There needs to be more flexibility in the schedule to reflect differences in the complexity of watersheds and in the current capability and progress of jurisdictions in conducting watershed assessments and preparing plans. The sequence of events that must happen prior to approval (i.e. development of state guidelines, NMFS approval of guidelines, watershed assessment, plan development, plan certification, and NMFS concurrence with certification) as well as the number of watersheds, make it highly improbable that the two year time limit can be met.

We suggest that NMFS consider the timeframe for completion and certification of watershed assessments be set at two years from the effective date of the 4(d) rule. Upon certification of a watershed assessment, the maximum period for the limit should be extended for up to three more years for completion and certification of a watershed plan. This is consistent with the positive benefits and low risks associated with the restoration activities to which the limit applies. It is also consistent with the timeframes being considered for watershed level plans in the proposed Tri-County Framework. In addition, the length of the temporary period of the limit for habitat restoration activities should run from the effective date of the 4(d) rule, rather than from the date of publication of the final rule.

There are active and organized efforts to engage in comprehensive watershed planning in 37 Water Resources Inventory Areas (WRIAs) in Washington State under the state Watershed Planning Act. Many of these plans will be nearing completion by the time the temporary limit on take prohibitions expires. Interested local governments should have the opportunity to include provisions in their Watershed Management Plans that address the standards under 233.203 (b)(8)(i)(A) with the expectation that those plans will be certified as meeting the 4(d) rule requirements. The criteria for evaluating conservation plan guidelines and subsequent plans should include the following four criteria in addition to the 10 already listed. These proposed additional criteria have been clearly noted and recognized elsewhere by NMFS, but were not

included in this subsection of the rule. **This is an important omission that should be corrected.** The proposed additional criteria are:

- *Consider WRIA scale analysis and where possible sub-basin scale analysis.*
- *Assess physical and biological processes that create and maintain fish habitat.*
- *Identify actions that restore natural aquatic or riparian habitat processes.*
- *Recognize and consider the dynamic nature of habitat forming processes.*

Absent such additional guidance criteria we are at risk of perpetuating “opportunistic” rather than “strategic” development of habitat projects, which may or may not result in properly functioning watersheds and habitats.

We recommend NMFS ensures that the following concepts are also integrated into the criteria for evaluating Watershed Conservation Plan Guidelines :

Identify affected populations within each watershed, their critical and viable sizes, and the criteria for properly functioning conditions within that watershed.

We suggest clarifying that the scope of Watershed Conservation Guidelines and Watershed Conservation Plans should not be limited to salmon habitat preservation and restoration projects only, but they should address a broader range of watershed issues related to salmon habitat (e.g., water quality, water quantity). A comprehensive watershed plan can provide a long-term blueprint for salmon recovery within the watershed. This suggestion is consistent with the Tri-County Framework being negotiated with NMFS and with an interpretation of the potential use of the New Urban Density Development Limit and its 12 principles. The role of watershed conservation plans relative to recovery plans needs also to be clarified. In addition, the issue of certification of local programs by the state needs further discussion.

We recommend that the following Washington State Integrated Stream Corridor Guidelines, which are currently under development, be recognized for subsequent amendments to the 4(d) rules to provide future coverage for a wider range of restoration activities: Channel Design Guidelines, Macro-Habitat Restoration Techniques, Estuary Restoration Guidelines, Siting and Design of Off-Channel Rearing Habitat, Shoreline Habitat Restoration Guidelines, and Marine Shoreline and Near Shore Activity Guidelines.

NMFS should clarify what standard applies during development of these Washington guidelines if other guidelines are not specified in the 4(d) rule. Are Washington projects that meet the Oregon standards covered in this limit on take prohibitions? No guidance document is referenced for "livestock water development off-channel" or for the "repair, maintenance, upgrade or decommissioning of roads in danger of failure." What should be referenced for those activities? Regarding repair, etc., of roads, what approach would be used to address roads that have failed and are not just in danger of failing? The 4(d) rule should address this comprehensively, rather than waiting for individual consultation during a failure emergency.

The following are comments on the specific categories of habitat restoration activities to which the temporary limit would apply:

- Riparian zone planting or fencing. We suggest that the scope of this limit clearly include marine shoreline planting to restore and protect shoreline structure. This would include the

same restrictions for no in-water work, no sediment runoff, and native vegetation only. The standards that should be referenced are Slope Stabilization and Erosion Control Using Vegetation, and Vegetation Management: A Guide for Puget Sound Bluff Property Owners, Washington Department of Ecology (1993); and Surface Water and Groundwater on Coastal Bluffs, Washington Department of Ecology (1995); copies are included for your review, approval and referencing.

- Livestock water development off-channel. We suggest allowing minimum modification of banks necessary for installation, and no diversion dams. The adequate screening provision should include a cross-reference to NMFS Juvenile Fish Screen Criteria (1995). The livestock water development should be done in association with complete livestock exclusion fencing. No guidance document is referenced for “livestock watering development off-channel.” We are attaching for your information copy of the state's Policy for Conveying Stockwater away from Streams to Protect Water Quality, which provides guidance on livestock water development off-channel. We like to work with you on development of guidance document for this category of habitat restoration.
- Large wood or boulder placement. The exclusion for large wood placement associated with basal area credit should apply to Washington as well as Oregon. We suggest allowing anchoring devices for large wood or wood/boulder complexes where loose debris is likely to cause damage or a hazard. There are conditions that may make this limit nearly moot, especially the requirement to install large, stable large woody debris (LWD) without heavy equipment and without anchoring devices. As proposed, this requirement would have a negative impact on the Department of Transportation structures as a result of increased debris loading and stream channel changes that may erode streambanks adjacent to roads.
- Correcting road/stream crossings, including culverts, to allow or improve fish passage. An important omission is that repair, maintenance and upgrade of existing fishways are not clearly covered by the rule, but rather only the act of correcting the barrier. We suggest clarifying that this activity may include work to maintain fishways and culverts for fish passage, provided that woody debris is left within the stream channel and any sediment removed is deposited at an upland site where it cannot reenter the stream. In many cases, barrier culverts are removed and replaced with bridges. This has long been the expressed preference of regulators for these situations since the bridges allow the channel to assume a more natural, less confined configuration, which is preferable for the long term. This is a costly process and represents a significant investment in improving the environmental baseline. There are significant long-term improvements, which come with limited short-term impacts, including potential take. The same can be said for replacing existing bridges with wider spans, which are less confining to the stream channels. We feel these situations should be included within the limit on take prohibitions.
- Salmon carcass placement. Certain provisions in the Oregon guidelines for salmon carcass placement are not applicable in Washington. For example, Oregon Department of Environmental Quality does not have authority to review carcass placement in Washington. We have a program, which has already been through environmental review and is fully operational. We request that NMFS review and reference "Washington State Protocols and

Guidelines for Distributing Salmonid Carcasses to Enhance Stream Productivity in Washington State" (WDFW, 1998) as the applicable guidelines for use in Washington; a copy is included for your review, approval and referencing. Additionally, the proposed rules refer to numbers of spawners "substantially below historic levels". This needs further definition. Recent findings by Gresh, Lichatowich, and Schoonmaker, in the January 2000 issue of Fisheries; Michael in the November issue of Northwest Science; and Bilby in an as yet unpublished work on coho all argue that current escapements are as much as an order of magnitude (or two) less than what the ecosystem needs, even in systems where we are meeting our current management goals. This work should be considered when defining criteria for carcass placement.

We recommend you add the following specific habitat restoration activities to list of temporary limits on take prohibitions:

- Appropriate marine/estuarine shoreline restoration activities, including tide gate opening or removal, removal of shoreline armoring, the removal of deflector groins, etc.; spawning gravel augmentation
- Upland erosion control practices consistent with Washington's Integrated Streambank Protection Guidelines.

It is not clear whether pre-project activities such as surveying, electrofishing and habitat assessments and post-project activities such as smolt trapping and spawning surveys are covered. We recommend that they be included in this limitation. Alternatively, they could be included under the scientific research limitation if such limitation covers state fish and wildlife agencies and non-fish and wildlife entities.

The word "artificial" prior to bank stabilization in the first paragraph of this section should be removed or its meaning further clarified.

The beneficial and low-risk habitat restoration activities included in the limit should not be burdened with unneeded procedures. NMFS concludes that it is not necessary or advisable to provide additional federal protections through imposition of take prohibitions on these restoration actions. However, it is unclear what NMFS intends regarding the potential for Section 7 consultations to be required for such activities. We suggest clarifying that restoration activities covered by the limit and that involve action, permitting, or funding by a federal agency will be reviewed under a streamlined Section 7 consultation process.

Section (b)(8) of the rule provides that the states must certify to NMFS in writing that a habitat restoration activity is part of a watershed conservation plan. This appears to be in addition to state certification and NMFS concurrence that a watershed conservation plan is consistent with the Watershed Conservation Guidelines developed by the state and approved by NMFS. The NMFS criteria for the guidelines already require substantive and procedural safeguards to ensure that specific activities are consistent with the watershed conservation plan. Activities will be subject to local and state and, in some cases, federal review. An additional state certification for each activity would not be useful and should be eliminated.

Section (b)(8)(v) provides that NMFS approval of a plan shall be a written approval by the

Regional Administrator. We suggest the language be revised to clearly reflect the earlier language in the rule: “NMFS concurrence with a state finding of plan consistency shall be...”

(9) Water Diversion Screening

The proposed rules imply that this limit applies only to irrigation diversions, but the language is unclear. Please clarify whether the rules apply to all diversions (e.g., water supply, hydropower, etc.) or just irrigation diversions.

NMFS needs to either clarify what is meant by “other protections” in relation to screening of diversions for this limit on take prohibitions, or delete the sentence. There are no “other protections” besides constructing, operating and maintaining compliant fish screens. We recommend the phrase “...or other protections...” in the supplemental information be deleted.

The proposed rule states that written acknowledgment from NMFS engineering staff is needed for compliance with this limit on take. To facilitate compliance, we recommend the state's fish passage engineers be allowed to provide recommendations to NMFS on whether devices and facilities meet State criteria and then have NMFS be responsible for final certification. Further clarification is needed on whether facilities constructed by state and federal agencies need certification. Fish screens constructed, operated and maintained or owned by Department of Fish and Wildlife or federal agencies (e.g., hatchery intake screens, man-made lake intakes) should be covered when certified as compliant with the NMFS/WDFW “regional” fish screening criteria adopted by the Columbia Basin Fish & Wildlife Authority’s, Fish Screening Oversight Committee (FSOC).

The proposed rule addresses operation and maintenance as well as the screen itself, but there are no specific guidelines referenced for these activities. NMFS has not published detailed operation and maintenance procedures for fish screens. Procedures will vary between different types of screens, so several different sets of procedures will need to be developed. The state has begun writing operation and maintenance guidelines for use by diversion owners. Guidelines for two types of gravity fish screens (Rotary Wiper - Flat Plate Fish Screens and Paddlewheel-Drive Rotating Drum Fish Screens) are published on the Department of Fish and Wildlife’s Internet site, with more planned to be added later; copies are included for your review, approval and referencing. FSOC, with NMFS’s participation, should develop and publish region-wide operation and maintenance procedures for all the different types of fish screens -- similar to what was done in adopting the regional screen construction criteria.

Unlike the habitat restoration take limit, this section does not cover the activity of screening. Similar to the habitat restoration take limit, the necessary pre-project and post-project assessment activities are not clearly exempted and should be included under this take limitation.

The proposed rule addresses pump screens but the criteria are not specified. NMFS and WDFW fish screen biological protection criteria apply to all surface water diversions -- gravity and pump. How a diversion owner effectively complies with the criteria during design/construction differs between types of diversions. Additional mandatory criteria or recommended guidelines for pump screen design/construction should be developed by FSOC and approved by NMFS to assure that biological protection criteria are being met at all times.

The last paragraph is not clear in its discussion of take related to water diversion facilities. Take should not apply to temporary diversion of stream flows, such as during culvert repairs to avoid increased turbidity. Such temporary diversion is generally required as part of the state Hydraulic Project Approval and Water Quality Certification. This needs to be clarified in the final rule.

We suggest NMFS post the screening criteria on the NMFS NW Regional Office web site, so it is available to watershed groups and others.

(10) Routine Road Maintenance

While the recognition of the Oregon Department of Transportation (ODOT) program may be appropriate, it would be beneficial if NMFS identifies the specific standards/criteria and guidance that will be used to evaluate and determine that routine road maintenance programs do contribute to "properly functioning habitat conditions." WSDOT, counties, and cities in Washington State will want to use the specific guidance and the model provided by the recognized ODOT program to develop and submit programs that may qualify for the limit on take prohibitions. This limit should be available to any state, county or city that develops programs consistent with the NMFS' guidance.

We are very concerned and disappointed that NMFS does not mention the Washington State Road Maintenance Manual despite significant coordination and involvement with NMFS on the subject of road maintenance practices in Washington -- especially since Washington State Department of Transportation (WSDOT) has been actively seeking, since 1998, NMFS review and approval of its manual. Appropriate language to allow recognition of the Washington Road Maintenance Manual should be added to the rule. We suggest adding, as a placeholder, the following language associated with the "Routine Road Maintenance Limit on Take Prohibitions" that begins on page 181:

"Washington State Department of Transportation, in cooperation with local agencies across the state, is developing a maintenance manual, which will contain practices similar to those developed in Oregon. When agreement is reached on the efficacy of this program in Washington, and similar commitments are made by the state, it is expected that routine road maintenance conducted by WSDOT and local governments who agree to operate under those programs will adequately address the problems associated with such activity."

While we appreciate the work of ODOT in developing their manual, we have some areas of concern with regard to how this manual could be applied in Washington state. To provide certainty for salmon recovery, we recommend further work in the following areas:

- To the maximum extent possible, the manual should contain enforceable standards.
- The manual should avoid using disclaimers such as "where feasible" and "where practicable" to increase the level of certainty regarding implementation of BMPs.
- Required protective and mitigation measures for work conducted outside of BMPs. should be described.
- Requirements for training programs should be documented.
- The manual should describe an effective, proactive, monitoring program for maintenance

projects.

- The manual should contain specific timetables for project reviews and manual updates.
- Terms not in common usage should be clearly defined.
- Effective erosion controls and a list of specific techniques should be defined, including a description of methods to be used during emergencies.
- Mandatory work windows should be defined to protect vulnerable life stages of salmonids.
- Criteria for the use of bioengineering methods should be described.
- Riparian management zones should be clearly defined by water type or the criteria used to determine riparian buffer widths identified.
- Procedures for consultation with other state agencies should be documented and a process for conflict resolution identified.

Also, since the proposed rule outlines a process for how road maintenance activities must function in order to be exempt from ESA take liability through the Routine Road Maintenance section, this section could be amended so it is available to any state, county or city that develops programs. These programs should address procedural and regulatory differences between the states. We suggest adding language associated with the "Routine Road Maintenance Limit on Take Prohibitions" that begins on page 181 that authorizes later certification of state road maintenance programs under the existing road maintenance limitation and allows NMFS divisions to add conditions on a regional basis.

(11) Portland Parks Integrated Pest Management

This limit on take prohibitions should be available to state parks and recreation departments and counties and cities operating parks throughout the areas covered by the 4(d) rules, if they develop and implement programs and activities that qualify. NMFS, in conjunction with the appropriate state agencies should develop criteria for Integrated Pest Management (IPM) programs so that any IPM program can be fairly evaluated in terms of meeting the criteria. In addition we are recommending that NMFS review and approve Washington state programs addressing the use and application of aquatic pesticides and herbicides. These programs are referenced below.

We support IPM as the proper approach for addressing pest control problems while minimizing adverse effects on listed species and their habitats. The purpose of IPM programs has been somewhat distorted in the proposed 4(d) rules. IPM, as used by Washington state agencies, means a combination of planned control actions (cultural, physical, chemical and mitigation) and application methodologies that lead to the most effective long term control of target pest species with the least environmental or "non-target" effects. It includes training, detection, ongoing monitoring, and adaptive actions to be most effective. IPM does not necessarily mean elimination of the use of chemicals, but invariably leads to a net reduction in use.

The Portland Parks IPM program will likely provide adequate protection for salmonids within a city park context, which involves intensive management of a limited land area, relatively high use per-unit-area by people, and probable use of lawn grasses as a major ground cover. It is important to emphasize that the Portland Parks IPM program would not necessarily be as effective, nor would it result in the best protection of fish or wildlife habitat, outside of an urban park setting. For example the Portland Parks IPM program describes a 25 feet buffer adjacent to water courses within which they use only prescribed herbicides and other chemicals. This width

is considerably narrower than the 50-200 feet widths suggested in other parts of the proposed 4(d) rules. While a 25 feet buffer may be adequate for a closely controlled park setting, it will not provide adequate protection for salmonids in non-park or wild land areas.

We are concerned with avoiding and minimizing impacts to salmonids from the use of aquatic herbicides. Copper based aquatic herbicides (for instance, Cutrine Plus as listed in the proposed 4(d) rules for Portland Parks), can be particularly problematic for salmonids. At levels only slightly above background and far below chemical application rates, for instance, copper interferes with salmonid migration, smoltification, and subsequent early marine survival. The use of copper-based herbicides should be completely avoided during salmon-out migration. Copper-based herbicides may affect salmonid survival at other life stages and in other ways, as well. Repeated usage of copper based aquatic herbicides for algae control in lakes, for instance, results in copper build up in lake sediments and disruption of multiple habitat functions.

An additional area of concern relates to the use of non-selective herbicides. These must be used with care, even though their toxicity to fish, invertebrates, and other animals may be relatively low. For example, glyphosphate is relatively benign to fauna, but will kill or damage most plants. Selectivity must be obtained by application methodologies so desirable vegetation is not affected. This may limit the amount of herbicide used and provides a competitive advantage for the remaining desirable vegetation to assist with long-term weed species control.

The rules fail to recognize the important role pesticides can play in controlling noxious or invasive weeds to protect and restore salmon habitat (e.g. herbicide application in wetland mitigation sites.) If done inappropriately, weed control can certainly have adverse effects on fish. However, if done with maximum consideration for the principles of IPM, and with the view that weed control is only one step toward restoration of habitat, it can be beneficial to fish habitat protection and enhancement efforts.

In Washington state, comprehensive integrated management of invasive non-indigenous aquatic species has been extensively evaluated in the Noxious Emergent Plants Management Final EIS (November, 1993) developed and adopted under the State Environmental Policy Act. In addition the Aquatic Plants Management Program, administered by the Washington Department of Ecology, was also evaluated in the 1992 Final Supplemental Environmental Impact Statement. The program provides stringent oversight of aquatic pesticides by issuing a site-specific permit (i.e. Temporary Modification of Water Quality Standards) for each proposed aquatic pesticide application to state waters. We are including copies of the two environmental documents and focus sheets explaining the programs. We request your review, approval and addition of these two programs to either this limit or as new limit on take prohibitions. We like to work with you on any additional guidance on use of pesticides and herbicides.

(12) New Urban Density Development Limit

We commend NMFS and Portland Metro for their efforts in developing this proposed limit from the take prohibitions for local governments. For salmon recovery to be successful, it is vital that counties and cities develop and implement programs and ordinances that adequately protect salmon habitat. While the 12 criteria listed are qualitative in nature and provide flexibility for local governments, they provide very little guidance on what will be required of local

government programs. It leaves open to wide interpretation what NMFS will accept to meet these criteria, and will likely result in a wide variety of proposals, some of which may not adequately protect salmon habitat. The state and local governments will benefit from additional clarification of these criteria. The more clearly these criteria can be stated in objective, measurable terms, the more clear will be the blueprint you provide for the state and local governments to work from.

The draft 4(d) rules language indicates that cities and counties in other states may utilize this proposed limit. As stated earlier, we recognize and respect the fact that some local governments may wish to develop and present to NMFS their own proposals for programs or activities they feel will provide for the conservation of listed salmonid species and that should qualify for a limit from the take prohibitions. We also recognize that many local governments do not have the resources to conduct scientific studies, monitor, and implement what in most cases would be strict regulations. They may desire, instead, to build on accepted programs as a model or prefer to have their programs or activities covered through a programmatic approach.

In Washington State we believe the process of evaluating and approving city and county proposals under this limit should use and build on existing programs and mechanisms as much as possible. Examples include minimum standards for stormwater, minimum requirements for wetland protection, and shoreline management guidelines. We offer to work in partnership with NMFS and local governments to build on existing state programs and mechanisms that can provide guidance for local implementation. As you know, we are engaged in discussions with NMFS and USFWS on guidelines for shoreline management.

It does not appear that any of the 12 criteria that NMFS established provide protection for marine and estuarine shorelines and wetlands, including buffers and restrictions on shoreline hardening. NMFS has recently designated freshwater and estuarine critical habitat for several ESUs to include riparian areas that provide the following functions: shade, sediment transport, nutrient or chemical regulation, streambank stability, and input of large woody debris or organic matter (2/16/2000; 65 FR7764, page 7773). Given this critical habitat designation, we believe NMFS should include additional criteria under this proposed limit that address marine and estuarine shorelines.

Terms such as “stream meander patterns” and “channel migration zones” need to be clearly defined. We fully support the protection of channel migration zones and floodplains for salmonid recovery. We are concerned that riparian buffers alone will not provide adequate protection for salmonids because they do not easily reflect the nature of floodplains. Unconstrained, low gradient meandering and complex floodplains are key fish production areas but are not easily protected by standard buffers. We also recommend that NMFS should aggressively pursue Section 7 consultation with Federal Emergency Management Agency (FEMA) to stop the federal insuring of development in floodplains.

NMFS needs to clarify the potential scope of this limit on take prohibitions. This limit on take prohibitions should be applicable to any city or county that will implement ordinances and programs to control the impacts of new development, urban or rural, consistent with **all** of the 12 principles. However, we believe the 12 principles cited in this section of the proposed rule do not

necessarily apply to urban density development in rural areas, such as planned destination resorts, and high density development along shorelines in rural areas. Can the principles you reference (derived from Spence, An Ecosystem Approach to Salmonid Conservation), be tailored to rural settings as well?

Finally, linkages should be created among the 12 principles for New Urban Density Development, the watershed-level plans provided for in the proposed Tri-County Framework, and the Watershed Conservation Guidelines. The 12 principles as they are modified or refined should serve as additional criteria for Watershed Conservation Guidelines and as guidance to watershed-level plans.

(13) Forest Management

The proposed 4(d) rules should clarify that the purpose of the Forest and Fish Negotiations was to upgrade forest practices rules to comply with ESA and the Clean Water Act, not simply to “develop modules . . . for inclusion in Washington Governor Locke’s Salmon Recovery Strategy.” The Forest and Fish Report (FFR) intends to provide protection for all fish and six stream-associated amphibian species, not only salmonids as the proposed 4(d) rule implies.

As demonstration of certainty of implementation of FFR, the 4(d) rule should reference the passage by the 1999 Washington State Legislature of the "Act relating to forest practices as they affect the recovery of salmon and other aquatic resources," Engrossed Second Substitute House Bill 2091 (ESHB2091). Similarly, the 4(d) rule should include acknowledgment of the steps the Washington Forest Practices Board has taken to date adopting rule to implement FFR, and the funding approved by the Legislature and the Salmon Recovery Funding Board. (This information can be obtained from DNR Forest Practices Board staff.)

NMFS needs to include in this limit on take prohibitions the application of pesticide and the use of “alternate plans.”

II. Comments applicable to Tribal Plans Rules

A. General Comments

The State believes that there should not be a separate rule and a different process to analyze the potential impacts of tribal activities on listed salmon. Existing and proposed mechanisms to analyze the impacts of actions and activities (i.e., §§ 7 and 10 of the ESA and the proposed rules governing take of Pacific salmon (hereinafter “salmon 4(d) rules”) afford the Secretary more appropriate avenues to analyze the impacts of proposed tribal activities in light of treaty rights and federal trust responsibilities. The utilization of these other mechanisms would encourage the appropriate (and in some instances, court ordered) cooperation and participation of all parties affected by a tribe's proposed activities. Conversely, the proposed Tribal Rule offers an exclusionary process with vague, undefined standards, the utilization of which will likely create divisive relationships among the tribes, the states, and the regulating federal agencies. For these reasons, the State believes that the salmon 4(d) rules should be universally applicable.

In the event, however, that the Secretary decides that a separate tribal rule is desirable, such rule should contain the same standards and requirements that the Secretary identified as necessary and advisable for the conservation of chinook, chum, coho, steelhead, and sockeye in the proposed salmon 4(d) rules. The proposed salmon 4(d) rules contain detailed qualifications, conditions and requirements covering myriad activities which may, if the conditions are met, qualify for exception from Section 9 liability for take. If these conditions are truly necessary for the conservation of the listed ESUs, they are equally necessary for the same tribal activities that impact threatened fish.

B. There Is No Need or Justification for a Separate Tribal 4(d) Rule.

1. The Protection of Treaty Rights and the Discharge of the Federal Trust Responsibility Is Better Accomplished Without the Proposed Tribal Rule.

The proposed Tribal Rule, 65 Fed. Reg. 108 (January 3, 2000), recites that the regulation is authorized and prompted by a need to "harmonize statutory conservation requirements with tribal rights and the federal trust responsibility to the tribes." We do not agree with the conclusion that treaty rights or the federal trust responsibility allows or requires the ESA to be interpreted differently for Indian tribes than for others in the context of these 4(d) rules for salmon. Ninth Circuit case law as well as an opinion of the Interior Solicitor supports our position, 87 Interior Dec. 525 (1980) WL104188 (D.O.I.)("the Endangered Species Act is within complete harmony with the exercise of treaty hunting and fishing rights by Indians because those rights do not include the right to take endangered or threatened species and thus application of the Act to Indians does not restrict or abrogate their treaty rights."); Morongo Band of Mission Indians v. Federal Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998) (unless there is a specific duty that has been placed on the government with respect to Indians, the trust responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes).

2. The Justification for the Proposed Tribal Rule That "Tribal Activities Have Not Been Identified as Major Factors Contributing to the Decline of Threatened Species" Is Unfounded and Arbitrary.

It is entirely arbitrary to suggest that activities, when engaged in by tribal members, do not contribute to the decline of threatened species, while the same activities, if engaged in by others, do. Moreover, given the nature and history of treaty rights, tribal harvest and hatchery actions must be considered roughly equivalent to non-tribal harvest and hatchery activities. Efforts to justify a separate 4(d) Tribal Rule based on the assertion that tribal activities are not major factors contributing to the decline of threatened species are not rationally based.

C. The Proposed Tribal Rule Is Inconsistent With Court Orders.

Pursuant to the proposed Tribal Rule, tribal plans "may be developed by one tribe or jointly with other tribes," but need not involve the states. Tribal plans "may" -- but need not -- "be developed and implemented" within the context of a federal court proceeding, with continuing jurisdiction over the subject matter of the tribal plan." (I.e., United States v. Oregon or United States v. Washington.) There is, however, no requirement that tribes, or the Secretary, consult with the states, and no requirement of consistency with court orders. The proposed Tribal Rule places the

Secretary and NMFS in jeopardy of violating court orders governing both allocation and coordination of tribal and non-tribal fishing activities in both United States v. Oregon and United States v. Washington. The proposed Tribal Rule induces and facilitates unilateral fishery management in violation of court orders compelling coordinated and cooperative decisions and actions.

In addition, the differential administration of the ESA contemplated by the separate Tribal Rule will very likely interfere with the state's ability to prosecute its fishery and have a fair opportunity to take its allocation of the harvestable surplus of salmon. The consequences of such differential administration are becoming apparent in connection with current efforts to administer the ESA in the context of Columbia River Treaty and Non-Treaty fisheries.

D. CONCLUSION

The proposed rule will interfere with and serve as a disincentive to state/tribal cooperation in the management of fisheries impacting listed species. Such cooperation is not only mandatory under the law, but it is required by practical necessity. Cooperative management between the states and tribes should be fostered not frustrated. The proposed tribal rule offers the tribes a separate process, based on less stringent standards, expedited review and de minimis public participation. Given these inducements, the tribes are likely to utilize this separate process rather than the optional joint review process contemplated in the salmon 4(d) rules. The net effect will be divisive, contentious and not in the best interest of the resource.

The State would urge the Secretary not to promulgate a separate Tribal Rule. As discussed above, §§ 7, 10, and/or the proposed Salmon Rules can and should be used to administer the ESA for tribal as well as non-tribal entities and individuals. The use of a uniform set of 4(d) rules will facilitate continued compliance with court orders, encourage cooperation between governments, and serve the best interests of the resource.